Filed 1/14/13 In re O.R. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re O.R. et al., Persons Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. NICOLE R., Defendant and Appellant.	B240360 (Los Angeles County Superior Court Case No. CK78504)

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth Kim, Juvenile Court Referee. Affirmed.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

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Appellant Nicole R. (Mother) challenges the juvenile dependency court's finding that her child J.F. Jr. was not an Indian child within the Indian Child Welfare Act (ICWA). She specifically contends that the Department of Children and Family Services (the "Department") failed to satisfy ICWA's inquiry and notice requirements of the Act, and therefore the court's determination that ICWA did not apply is infirm. As we shall explain, the Department's inquiry into the Indian heritage of the child was sufficient, however, the ICWA notice did contain several errors. Nonetheless, under the circumstances the errors are harmless as they pertained to individuals who, by parents' admission, were not enrolled or registered in any tribe. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother is the biological mother of J.F. Jr., a son, born in February 2009; J.F. Sr. (Father) is the presumed father of J.F. Jr. On August 13, 2009, the Department received a referral that Mother and Father engaged in domestic violence and J.F. Jr. was injured in the dispute. J.F. Jr.[1] was detained from Mother and Father due to emotional abuse and caretaker absence/incapacity.

On August 18, 2009, the Department filed a dependency petition pursuant to Welfare and Institutions Code section 300 on behalf of J.R. Jr. alleging that Mother and Father had engaged in a violent altercation.

At the August 18, 2009 detention hearing, Mother filed a Parental Notification of Indian Status, stating that she did not have Indian ancestry. The court made an inquiry as to the Indian heritage regarding the Father, but the Father was not present at the hearing. However, the paternal grandfather of J.F. Jr. was present and claimed Indian Heritage. He stated that neither he nor J.F. Jr. were registered with the tribe and indicated that he was uncertain as to whether J.F. Jr. was eligible for registration. The court ordered the Department to contact J.F. Jr.'s father's side of the family regarding possible Indian

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1 J.F. Jr. has an older half-brother, O.R., who was named in this petition. However O.R. is not the subject of this appeal because O.R. and J.F. Jr. do not have the same father, and O.R.'s father did not claim Indian heritage.

heritage and file a supplemental report regarding this investigation. The court ordered the children detained.

On September 15, 2009, Father filed a Parental Notification of Indian Status stating that he may have Indian Ancestry, specifically "Cherokee and other (Kitu?)." He additionally stated that other members of his family were members of a federally recognized tribe, stating, "Cherokee – Delores [F.] – PGM" and "Kitu(?) – Samuel F. PGF. . . ."

In addition to the Parental Notification, the court asked Father if he or his children were enrolled or registered with the Cherokee Nation. Father indicated that neither he nor his children were registered, but he believed that his grandparents were members of the tribe. He did not know if his grandparents received any tribal benefits. Accordingly, the trial court ordered the social worker to interview the party claiming Indian heritage and include the results of the investigation in the next report.

In the October 13, 2009 supplemental report, the social worker reported that Father failed to meet with the social worker at the agreed upon appointment time. Further, despite being requested to do so, Father failed to provide ICWA information. However, the social worker indicated that sufficient information was obtained from other sources to send ICWA notices. The Department reported that notices were sent by certified mail to the Cherokee Nation of Oklahoma, the United Keetowah Cherokee, Eastern Band Cherokee, Secretary of the Interior, Bureau of Indian Affairs (BIA) and Father on September 29, 2009.

On October 20, 2009, trial counsel for the Department requested a continuance on the grounds that the ICWA notices listed an incorrect date for the time of the next hearing. The court continued the matter until November 2, 2009.

On November 2, 2009, the Department submitted Domestic Return Receipt from the BIA indicating that the BIA received the September ICWA notice. The Department also submitted a letter from the Cherokee Nation in Oklahoma indicating that it had received notice. During this hearing, Mother and Father waived their trial rights and submitted the petition on the basis of the social workers report. The court sustained the

petition and declared J.F. Jr. and O.R. to be dependent children of the court pursuant to Welfare and Institutions Code section 300. The court ordered the children to be removed from the custody of the parents and suitably placed. The court offered Mother and Father to participate in family reunification services and monitored visits with the children and with Department discretion to liberalize visitation.

At the conclusion of the hearing, the court asked for a 90-day progress report on the ICWA matter, and "in the event this child is a child described by the Indian Child Welfare Act, the disposition orders will be vacated at that time. . . ." On January 13, 2010, the court advanced this progress hearing to February 23, 2010.

At the February 23, 2010 progress hearing, the court stated that it was in receipt of response letters and proof of service for the ICWA notices sent on November 13, 2009. The court found that ICWA did not apply to this case. The letter from the Cherokee Nation contained the incorrect names of Father, Mother and J.F. Jr. and incorrect birth dates for Mother and J.F. Jr.

On May 26, 2010, at the six-month review hearing, the juvenile court terminated Father's reunification services. However, the court found that Mother was in compliance with the case plan and set the matter for a 12-month review hearing. The court found Mother in compliance with the case plan at the 12-month hearing as well.

In a report for the Welfare and Institutions Code section 366.22 review hearing, the Department disclosed that Mother was non-compliant with random drug testing and had tested positive for marijuana. On May 31, 2011, the juvenile court terminated family reunification services for Mother and set a Welfare and Institutions Code section 366.26 hearing.

In the Welfare and Institutions Code section 366.26 report, the social worker stated that adoption by the maternal great-grandmother had been identified as the permanent plan for the children and that home study was in progress. At a continued Welfare and Institutions Code section 366.26 hearing on January 24, 2012, the Department disclosed that the home study had yet to be completed. On January 24, 2012,

the court ordered the Welfare and Institutions Code section 366.26 hearing to be continued until May 2012.

Thereafter on March 28, 2012, Mother filed a notice of appeal[2] from the January 24, 2012 order continuing the Welfare and Institutions Code section 366.26 proceedings.[3]

DISCUSSION

On appeal, Mother argues that the juvenile dependency court erred in finding that ICWA did not apply. Specifically, she asserts the Department failed to comply with the ICWA inquiry and notice requirements.

I. Federal and State ICWA Notice Requirements

The purpose of ICWA is to "'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.'" (*In re Karla C.* (2003) 113 Cal.App.4th 166, 173-174, quoting 25 U.S.C., § 1902; see also *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 229; *In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1299.) "ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource." (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) For purposes of ICWA, an "Indian child" is a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C., § 1903, subd. (4).)

When a court "knows or has reason to know that an Indian child is involved" in a juvenile dependency proceeding, the court must give the child's tribe notice of the pending proceedings and its right to intervene. (25 U.S.C., § 1912, subd. (a); *In re S.B*

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2 An ICWA notice issue is a proper subject of review for an appeal from an order entered at a Welfare and Institutions Code section 366.26 hearing. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 260.)

3 The section 366.26 proceeding has been continued a number of times pending the completion of the home study. The next 366.26 hearing is scheduled for February 26, 2013.

(2005) 130 Cal.App.4th 1148,1157.) Under ICWA, an Indian tribe is entitled to intervene in a state court proceeding brought to remove an Indian child from a parental home and place the child in foster care. (25 U.S.C., § 1911, subd. (c).) Because the right to intervene is meaningless unless the tribe receives notification, ICWA specifies notice requirements and those notice requirements are strictly construed. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.)

The object of tribal notice is to enable a review of tribal records to ascertain a child's status under ICWA. (*In re K.M.* (2009) 172 Cal.App.4th 115, 119; *In re D.T.* (2003) 113 Cal.App.4th 1449, 1455.) The notices "must contain enough information to be meaningful. [Citation.] The notice must include: if known, (1) the Indian child's name, birthplace, and birth date; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) names and addresses of the child's parents, grandparents, great grandparents, and other identifying information; and (4) a copy of the dependency petition." (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.) "It is essential to provide the Indian tribe with all available information about the child's ancestors, especially the one with alleged Indian heritage. [Citation.] Notice . . . must include available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data." (*Ibid; In re C.D.* (2003) 110 Cal.App.4th 214, 224-225.)

Where the tribes have received ICWA notice, any error as to that notice is subject to harmless error review. (*Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784 [holding that an erroneous birth year for parent was harmless because this parent did not claim any direct connection to the tribe].)

II. Analysis of Inquiry and Notice In This Case

In the instant case, Mother claims the IWCA notices contained the following errors: (1) J.R. Jr.'s full name was not on the notice, (2) J.R. Jr.'s birth date was incorrect on the notice, (3) Mother's full name was not on the notice, (4) Mother's birth date was

incorrect on the notice, and (5) Father's full name was not on the notice. We find that these errors were harmless.

Nicole K. v Superior Court, supra, 146 Cal.App.4th 779, presented a similar scenario to the instant case. In *Nicole K.,* appellant argued that the court of appeal should reverse a judgment because the ICWA notice listed an incorrect birth year for the appellant. (*Ibid.*) However, the Third District held that since appellant admitted that she did not have a direct connection to any tribe "there is no basis to believe that providing her correct year of birth would have produced different results concerning the minors' Indian heritage." (*Ibid.*)

Here, errors in the ICWA notice were harmless because those individuals whose information was incorrect were not directly connected to any tribe. It appears that Mother, Father, and the child were not registered or affiliated with any Indian tribe. Mother admitted that she did not have any Indian heritage and that the child was not registered with any tribe. Father admitted that he was not affiliated with any tribe and merely thought his grandparents may have been registered. Only the paternal great-grandmother, Delores F., and paternal great-grandfather, Samuel F., were identified as possibly having a connection with an Indian tribe. Furthermore, there is no indication that the ICWA notices contained any errors related to these two individuals. Thus, even if the Mother's, Father's or child's information had been correct there is no reason to believe that this information would have produced a difference result concerning the minor's Native American heritage.

In addition to the errors in the notice, Mother contends the Department did not comply with its inquiry duty under ICWA. We disagree.

The record shows that the Department sufficiently complied with the inquiry requirement under ICWA. The Department attempted to interview Father to obtain ICWA information. The record shows that Father failed to meet with the social worker and did not provide ICWA information although repeatedly requested to do so. Because Father did not cooperate, the Department had to obtain information from other sources to

prepare the ICWA notices. Ultimately, the Department gave notice to the tribes Father and the paternal grandfather had identified.

Accordingly, Mother has not shown that the Department has failed to inquire and obtain, if possible, all the information about a child's family history. As the court held in *In re K.M.*, further inquiry is not required based on mere supposition. (*In re K.M.*, *supra*, 172 Cal.App.4th at p. 119; citing *In re Levi U.* (2000) 78 Cal.App.4th 191, 199 [the agency is not required to conduct an extensive independent investigation or to "cast about, attempting to learn the names of possible tribal units to which to send notices"].) Indeed as the court in *In re K.M.*, observed, "[p]arents unable to reunify with their children have already caused the children serious harm; the rules do not permit them to cause additional unwarranted delay and hardship without any showing whatsoever that the interests protected by ICWA are implicated in any way." (*In re K.M.*, *supra*, 172 Cal.App.4th at p. 120.)

In view of the foregoing, we conclude the court did not commit reversible error with respect to the ICWA finding in this case.

DISPOSITION

The order is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**